

RACHEL BALLOW,

HENRY A. RICE

AND

SAM J. JOHNSON

IBLA 76-711      Decided December 20, 1976

Appeals from two separate decisions of Administrative Law Judge Harvey C. Sweitzer affirming the Bureau of Land Management's decisions establishing the grazing capacity of two separate allotments, but remanding the cases for determination of the grazing capacity of annual forage within such allotments. NEVADA 5-75-1, NEVADA 5-75-2.

Affirmed as modified.

1.      Grazing Permits and Licenses: Adjudication

An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal Range Code for Grazing Districts, 43 CFR, Part 4110.

2.      Grazing Permits and Licenses: Range Surveys

A determination by the Bureau of Land Management of the carrying capacity of a unit of the federal range based on a range survey will not be disturbed in the absence of positive evidence of error.

3.      Grazing Permits and Licenses: Generally

Where a range survey was conducted giving no consideration to annual forage growth and there is evidence that annual forage plants, at times, comprise up to 50 percent of the available forage; that cattle

prefer annual forage; that some annual forage was available even in the very dry survey year; annual forage growth should be considered in determining the carrying capacity of the federal range.

APPEARANCES: Raymond Free, Esq., Pioche, Nevada, for appellants. Otto Aho, Esq., Field Solicitor, Office of the Solicitor, U.S. Department of the Interior, Reno, Nevada, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The Bureau of Land Management (BLM), Rachel Ballow, Henry A. Rice and Sam J. Johnson have appealed from two separate decisions of Administrative Law Judge Harvey C. Sweitzer both dated June 18, 1976. The decisions followed a consolidated hearing held by Judge Sweitzer on June 26, 1975. Separate decisions were issued pursuant to the request of counsel at the hearing (Tr. 3-4).

The hearing was held as a result of appeals filed by Ballow, Rice and Johnson from two decisions of the District Manager, Las Vegas District, BLM, both dated December 17, 1974, reducing the grazing privileges of Ballow on the Boulder Springs Allotment (NEVADA 5-75-1) and of Rice and Johnson on the Grapevine Allotment (NEVADA 5-75-2) based on a range survey conducted in August and September 1974. Both allotments are in the Kane Springs Administrative Unit.

The District Manager's decisions established that the grazing capacity of the Boulder Spring Allotment and Grapevine Allotment be reduced to 208 AUMs and 280 AUMs, respectively. At the hearing the parties stipulated that the sole issue for determination was the grazing capacity of the Boulder Spring and Grapevine Allotments (Tr. 9).

Judge Sweitzer found in both cases that BLM's determination of the grazing capacity was correct except to the extent that BLM failed to accord AUMs of grazing capacity for annual plant forage in the allotments. Judge Sweitzer remanded the cases to the District Manager for a determination of grazing capacity of annual forage and corresponding increase in the grazing privileges awarded in the December 17, 1974, decisions.

BLM has appealed that part of the decisions remanding the cases for consideration of the annual forage. Ballow, Rice and Johnson, on the other hand, question the Judge's ruling that the determination of the carrying capacity of the allotments was correct in other respects.

BLM argues that the decision of the District Manager not to include annuals in the determination of the permanent carrying capacity of the two allotments accords with a memorandum dated June 14, 1974, from Leader, Range Staff, Denver Service Center, to the District Manager, Las Vegas, recommending that the carrying capacity be computed on the basis of perennial vegetation only (Ex. 17). BLM points out that the Judge cited no authority for requiring the District Manager to consider annuals in rating the range and that the Judge usurped the District Manager's authority and substituted his judgment for that of the District Manager.

The range users argue that the range survey was erroneously conducted in that: (1) BLM failed to consider past use of the range; (2) the users were not consulted and (3) BLM disregarded the Advisory Board recommendations. They urge that BLM's failure to consider annual vegetation was arbitrary and that a range survey is merely a starting point for determining carrying capacity. They contend that other factors should have been considered such as the fact that the survey was conducted in a very dry year.

At the hearing the following evidence was introduced: James R. Brunner, a BLM Regional Planner who was Chief of [the] Party for the 1974 range survey, testified that the survey was conducted in accordance with the instructions in the BLM publication, Ocular Reconnaissance Forage Survey Handbook (1963) (Ex. A).

Brunner stated that he was instructed by his superior not to consider annual forage in conducting the survey (Tr. 221). The basis for the instruction was a memorandum from the Leader, Range Staff, Denver Service Center, to the Las Vegas District Manager dated June 14, 1974, which recommended that the carrying capacity be computed on the basis of perennial vegetation only (Ex. 17). Brunner's explanation for the inclusion of only perennial forage was that annual forage growth is unpredictable because it is tied directly to the amount and timing of annual precipitation (Tr. 32).

He stated that the year in which the survey was taken was very dry and as a result there was very little annual forage and the perennial forage was in a poor condition (Tr. 36-37).

Brunner admitted that livestock generally prefer annual forage to perennial, but he stated that realistically only the perennial could be given weight because only perennials would be available in a dry year (Tr. 65). He stated that in a wet year with an abundance of annual plants, temporary licenses could be issued to utilize that year's growth (Tr. 158).

When asked whether the range was misused in any particular area, he replied that "grazing was very close in the valley \* \* \*" (Tr. 62). He pointed out the area on Exhibit 1; the area being

between two springs in a location the animals normally frequented as they moved from one watering place to another (Tr. 63). He later explained that when he spoke of the valley he meant an area at least a mile wide, not a trail (Tr. 66).

Brunner testified that actual use of the range received no consideration under the method of survey employed herein (Tr. 44), and that he did not consult with the range users when the survey was made (Tr. 74).

In the 1972-73 season, Ballow was allowed 1,620 AUMs on the Boulder Spring Allotment (Ex. H), and Rice and Johnson 1,480 AUMs on the Grapevine Allotment (Ex. E). For the 1973-74 season Ballow was allowed 960 AUMs active and 660 AUMs inactive (Ex. G), and 880 AUMs active and 330 AUMs inactive for the 1974-75 season. Rice and Johnson were allowed 1,500 AUMs active and 1,500 AUMs inactive in both the 1973-74 and 1974-75 seasons. Brunner recommended on the basis of the survey that the AUMs on the Boulder Spring Allotment be reduced to 208 and the AUMs on the Grapevine Allotment be reduced to 280. The District Manager accepted the recommendation in issuing his decisions.

Jerry Jacobs, a BLM Range Conservationist, conducted utilization checks on the allotments in November 1974 (Tr. 197-99). The utilization check on the Boulder Spring Allotment showed that 86 percent of the key species (Galletta grass) had been removed by grazing during the year up to November 1974, which indicated "severe" grazing use (Ex. 16). The utilization checks on the Grapevine Allotment showed severe grazing (82 percent) of Galletta grass at one location and heavy grazing (78 percent) of the same species at a second location (Ex. 16). At the second location the Mormon tea plants (Ephedra nevadensis) showed heavy grazing (65 percent) (Ex. 16). Jacobs testified that the District Manager's decisions were based in part on the utilization checks (Tr. 214).

John Ballow, Rachel Ballow's husband, testified that 1974 was the driest year in 12 or 13 years (Tr. 85). He stated that ordinarily annuals comprise about half the forage on the Boulder Spring Allotment, the other half being perennials (Tr. 109). He felt that annual forage was a very important factor in feeding the animals (Tr. 98). He introduced 29 photographs (Ex. I 1-29) which he testified were taken on the Boulder Spring Allotment in May 1975 and which he felt demonstrated adequate forage and the healthy condition of the cattle on the range (Tr. 87-106). He thought the precipitation in the spring of 1975 was average or a little better than average (Tr. 110).

Henry A. Rice, one of the licensees of the Grapevine Allotment, testified that he had been in the ranching business for 30 years and that he had been using the Grapevine Allotment for

about 3 years (Tr. 112). He and Sam J. Johnson had been running 125 head of cattle on the allotment (Tr. 118). In his opinion the allotment could carry more animals (Tr. 118). Rice introduced several photographs (Ex. J 1-5) taken on June 24, 1975, by him on the Grapevine Allotment (Tr. 124-126). He stated that the pictures demonstrated the "shape of the cattle and the annuals, \* \* \*" (Tr. 126).

[1] An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the provisions of the Federal Range Code for Grazing Districts, 43 CFR, Part 4110. 43 CFR 4.478(b), Lloyd Pewonka, 8 IBLA 303 (1972), citing Joe H. Nettleton, 7 IBLA 282 (1972). See Boyd L. Marsing, 18 IBLA 197 (1974). As will be shown infra, we find that discarding annual forage completely in determining the carrying capacity of the range is unreasonable and justifies our modification of the adjudications below. Cf. United States v. Charles Maher, 5 IBLA 209, 79 I.D. 109 (1972).

[2] The Department has consistently held in cases questioning the accuracy of a range survey that a determination of range capacity will not be disturbed in the absence of positive substantial evidence establishing error in the determination. Midland Livestock Company et al., 10 IBLA 389 (1973); E. L. Cord, 9 IBLA 178 (1973); Alvie Holyoak Estate et al., 9 IBLA 37 (1973). It is not enough that a range user show that the grazing capacity could be in error, he must show that it is erroneous. Alvie Holyoak Estate et al., *supra*; Melvin Adams et al., A-30406 (November 1, 1965).

The ranger users' contention that the District Manager failed to consider actual use of the range in determining the carrying capacity is similar to an argument pressed in David Abel et al., 2 IBLA 87, 78 I.D. 86 (1971), wherein it was stated:

\* \* \* We simply find that, where there is conflicting evidence with respect to the grazing capacity of land, a determination of the quantity of forage available which is based upon a systematic study, the results of which are susceptible of verification or refutation, is more persuasive than a determination based upon what has been done in the past, without reference to definitive standards of proper range utilization or forage requirements.  
\* \* \*

Id. at 97, 78 I.D. at 94. Accordingly, evidence of actual past use, the condition of the cattle, and the condition of the range, cannot be substituted for an actual range survey, as conducted by BLM.

Ballow, Rice and Johnson complain that the BLM personnel conducting the survey failed to consult with them. However, the

record reflects that all three received notice that a survey was going to be conducted and all were invited to observe or work with the individuals conducting the survey.

The range users also argue that the District Manager ignored the recommendation of the District Advisory Board. Such an argument represents a misunderstanding of the function of the advisory board. <sup>1/</sup> The District Manager is free to adopt or reject, in whole or in part, the recommendation of the advisory board. The board is, as its name suggests, a body which merely provides advice. The District Manager is the official with the ultimate responsibility of establishing the carrying capacity of the Federal Range. See 43 CFR 4115.2-1(e)(3).

The range users also contend that the carrying capacity of the range should be adjusted because the survey was conducted in a very dry year. There is no dispute that the survey year was a very dry year with little annual forage growth. However, it is apparent from the testimony that the Bureau personnel were familiar with precipitation records in the area and calculation of the forage acre requirement is intended to compensate for fluctuations in yearly moisture averages. See N. J. Meagher and Company et al., A-30612 (December 12, 1966). <sup>2/</sup>

The above allegations by the range users are insufficient to establish error in the range survey.

[3] BLM argues on appeal that the Administrative Law Judge erred in determining that the range users had adduced sufficient positive evidence of error with regard to BLM's failure to accord any grazing capacity for annual plant forage in the allotments.

Brunner testified that annuals were not considered during the range survey and that he had been instructed not to include annuals in the computation of the carrying capacity. It is undisputed that annual forage normally supplies a significant percentage of the forage on the allotments, but that the numbers and types of annual

---

<sup>1/</sup> Grazing district advisory boards have since been terminated and multiple use advisory boards have been established. See 40 FR 25452-54 (June 16, 1975) and 41 FR 11822 (March 22, 1976). But see Federal Land Policy and Management Act of 1976, October 21, 1976, 90 Stat. 2775.

<sup>2/</sup> No adjustment for abnormal growing conditions is required according to the BLM Manual 4412.11a3i(c) which provides in pertinent part:

"Completing forage requirement studies for each specific survey area covered in a particular year makes the established requirements directly applicable to the survey area without the need of adjustments for any abnormal growing conditions that may have prevailed. \* \* \*"

forage available are directly related to the amount and timing of the precipitation.

While we recognize that the regulations, 43 CFR 4115.2-1(e)(3), require that no license or permit grant grazing privileges in excess of the grazing capacity of the Federal range as determined by the District Manager, we agree with the Administrative Law Judge that under the facts of this case annual forage growth should be considered in determining the carrying capacity of the allotments.

As pointed out by Judge Sweitzer, the annuals, because of their ephemeral nature, should not be rated equally with the perennial forage. However, there is evidence that annuals do, at times, comprise nearly 50 percent of the available forage on the allotments, that cattle prefer the annual forage, and that some annual growth was present even in the very dry survey year. For those reasons we conclude that the evidence presented at the hearing demonstrates error in the determination of the carrying capacity of the range in that no consideration was given to annual forage growth.

Therefore, we are in agreement with Judge Sweitzer's order remanding the case to allow the District Manager to conduct further studies to determine the actual grazing capacity of the allotments based on consideration of both the perennial and annual vegetation on the allotments. We recognize, however, that precipitation and annual forage are unpredictable. BLM Ocular Reconnaissance Forage Survey Handbook, *supra*, 4412.11a3f(1)(c) provides:

(c) Proper Use Objective. For most range areas, it is the management objective of the Bureau to maintain or recover the valuable perennial forage plants as the chief constituents of the vegetation. If this is to be realized, the less valuable perennials and annuals must be assigned use ratings sufficiently low to assure that no more than the allowable use is made of the desired species regardless of their current abundance.

Pending the action envisaged by this decision, it would be improper to allow a greater carrying capacity and authorization for grazing to exceed 416 AUMs and 560 AUMs for the Boulder Spring Allotment and Grapevine Allotment, respectively. This conclusion is compelled by the evidence that at best annuals constitute 50 percent of available forage. Since the reconsideration below is to add annuals' value to the forage capacity of the lands in issue, the above figures reflect the maximum forage capacity possible.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

---

Frederick Fishman  
Administrative Judge

We concur:

---

Joseph W. Goss  
Administrative Judge

---

Martin Ritvo  
Administrative Judge



